

Third Division
May 15, 2013

No. 1-09-1326

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(3)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	05 CR 6444
)	
JASON LARA,)	Honorable
)	Kenneth J. Wadas,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Sterba and Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* When the complainant's out-of-court statements could support a conviction for aggravated criminal sexual abuse, rather than the greater inclusive offense of predatory criminal sexual assault, the trial court must grant the defendant's request for an instruction on the lesser-included offense.

¶ 2 This case comes before the court on remand from the Illinois Supreme Court. A jury found the defendant, Jason Lara, guilty of two counts of predatory criminal sexual assault (PCSA) for inserting his finger into the vagina of an eight-year-old girl, J.O. On appeal, Jason asks us to reverse

the convictions and remand for a new trial because the trial court refused to instruct the jury on the lesser-included offense of aggravated criminal sexual abuse (ACSA). We hold that some evidence in the record could support an acquittal for PCSA and a conviction for ACSA, and therefore the trial court had an obligation to grant Jason's request for an instruction on ACSA. We reverse the trial court's judgment and remand for a new trial.

¶ 3

BACKGROUND

¶ 4 Augustina P. had two children, J.O. and C.A. Augustina, who worked many evenings, often asked her friend, Shelley Lara, to look after the two children. Sometimes J.O. and C.A. slept at Shelley's home, where Shelley's son, Jason, also slept. Augustina began dating John Cordero after she separated from her husband, Phillip A., who was C.A.'s father.

¶ 5 On February 11, 2005, Jason told Cordero that once, when Phillip A. came to visit, Jason heard sounds of licking and sucking coming from a room where Phillip A. and J.O. were alone together. On February 17, 2005, Cordero and Augustina went out for a few drinks after Augustina got off work. Cordero told Augustina what Jason had said.

¶ 6 The following morning, Augustina asked Cordero to talk to J.O. about the matter. Augustina's sister brought J.O. and C.A. to Cordero's home, before school. Cordero took J.O. into a bedroom and asked her if Phillip had ever touched her in a way that made her uncomfortable. J.O. said, "Yes, he has but it wasn't Phillip." J.O. said Jason had touched her inappropriately.

¶ 7 Augustina came in to talk to J.O., and again J.O. said Jason, not Phillip, had touched her "private part." Augustina called Shelley and the police. Shelley and Jason came to Cordero's home. Police officers arrested Jason.

¶ 8 Carey Kato, a forensic interviewer working for the Children's Advocacy Center, interviewed J.O. later that day. J.O. said that on two occasions about a month earlier, Jason had touched her “private part.” She pointed to her vagina. J.O. explained that when she and her sister slept at Shelley’s home, they stayed on the floor next to the bed in the living room where Jason slept. One night she woke up to find her pants and underpants pulled down to her knees, and Jason’s hand resting on her “private part.” A few days later, when she came back to lie on the floor after going to the bathroom late at night, Jason put his hand inside her panties and on her vagina. Kato specifically asked whether Jason put his hand inside her, and J.O. said it was outside her vagina on both occasions.

¶ 9 Jason signed a statement about the incident later that day. He admitted that in January 2005, on two separate occasions, he put his hand in J.O.’s pants and touched her vagina. He said that on the first occasion, while J.O. slept, he put his finger into her vagina as far as his fingernail, and then J.O. woke up. The second time J.O. was already awake when he put his finger into her vagina, with the finger again entering as far as the fingernail.

¶ 10 A grand jury indicted Jason on eleven separate counts for sex crimes against J.O., and prosecutors chose to try him on two counts of PCSA (720 ILCS 5/12-14.1(a)(1) (West 2004)).

¶ 11 Before trial, the prosecution filed a motion seeking to admit at trial testimony about the statements J.O. made to Augustina, Cordero and Kato. Augustina and Cordero testified at the hearing on the motion about the circumstances in which they elicited J.O.’s disclosures. Detective Linda Paraday, who watched Kato interview J.O., testified about that questioning and J.O.’s answers. The trial court found that the questions did not effectively coach J.O. to give the answers she gave,

and therefore the statements were sufficiently reliable for admission into evidence under section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10(c) (West 2008)).

¶ 12 Jason asked for a jury trial. The judge admonished the venire about the principles that the jurors must presume the defendant's innocence, the State must prove the defendant's guilt beyond a reasonable doubt, the defendant has no duty to present any evidence, and the jurors must not hold against the defendant his exercise of his right not to testify. See Ill. Sup. Ct. R. 431(b) (eff. May 1, 2007). The judge also asked the jurors, in panels of four, whether they agreed with the presumption of innocence and the burden of proof. The judge did not ask the jurors about the defendant's lack of a duty to present evidence or the right not to testify.

¶ 13 J.O. testified that for the first incident, she slept in jeans and a t-shirt. While she slept, she felt Jason's hand inside her pants, touching her vagina. She woke up and took her sister with her as she went to spend the rest of the night in Shelley's room. About three days later, when she again slept on the floor next to Jason's bed, she got up during the night to use the bathroom. When she came back, Jason again put his hand on her vagina. She pushed his hand away and went back to sleep. She did not tell her mother or Shelley about either incident because she thought she would get in trouble.

¶ 14 Augustina, Cordero and Paraday repeated the testimony they gave at the pretrial hearing. Paraday admitted that when Kato interviewed J.O., J.O. specified that Jason's hand stayed outside her vagina in each incident. An assistant State's Attorney read to the jury the handwritten statement Jason signed. The parties stipulated that in January 2005 Jason was 19 years old.

¶ 15 Jason testified that he never touched J.O. inappropriately, and he never put his hand in her

pants. Partly because of a conversation he had with J.O., he told Cordero about the sucking sounds he heard coming from a room where J.O. was alone with Phillip. After the arrest, Jason spent some hours locked in a cell. He fell asleep. When he awoke, he could not stand straight. He also experienced some twitches he could not control. He testified that he might have had an epileptic seizure in the cell without realizing it. He did not recall much about the statement he signed at the station. He could not make much sense of what the police had tried to say to him.

¶ 16 A doctor testified that Jason suffered from epilepsy, and at the time of the arrest, medications did not adequately control his condition. The doctor had no opinion as to whether Jason suffered a seizure on the day of the arrest. The doctor testified that epileptics often remain confused for hours after a seizure.

¶ 17 The court instructed the jurors that when they considered the testimony of any witness, they could take into account the witness's "ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case." The court did not instruct the jurors on the weight they should give statements made out of court, or factors to consider in assessing the credibility of children's statements. See 725 ILCS 5/115-10(c) (West 2008). The court refused Jason's request for an instruction on the lesser-included offense of ACSA.

¶ 18 The jury found Jason guilty on both counts of PCSA. The trial court sentenced him to terms of 10 years and 8 years in prison, with the sentences to run consecutively. Jason appealed. He argued that the State did not establish the *corpus delicti* for the offenses because the prosecution presented no evidence to corroborate his confession that he put a part of his finger inside J.O.'s

vagina. This court agreed and reversed the conviction for PCSA. We reduced the convictions to convictions for ACSA, and remanded the cause for resentencing.

¶ 19 The State appealed to the Illinois Supreme Court. Our supreme court held that the evidence of sexual contact sufficiently corroborated Jason's confession. The Illinois Supreme Court reversed our judgment and remanded for this court to consider two issues we did not address in our original disposition of the case.

¶ 20

ANALYSIS

¶ 21 Apart from the *corpus delicti* argument, Jason raised five separate arguments on appeal. He argued (1) the trial court should have excluded the testimony about J.O.'s out-of-court statements; (2) the court failed to comply with Supreme Court Rule 431(b), concerning admonitions to jurors; (3) the trial court should have instructed the jury in accord with the requirements of section 115-10(c) of the Code; (4) the trial court should have instructed the jury on the lesser-included offense of ACSA; and (5) the trial court imposed an excessive sentence. In the first appeal, we held that the trial court did not abuse its discretion when it admitted into evidence the statement J.O. made out of court to Augustina, Cordero and Kato, that the failure to comply with Rule 431(b) did not amount to plain error, and that the court did not commit plain error by failing to instruct the jury in accord with section 115-10(c) of the Code. Our supreme court did not disturb these holdings. We now address Jason's argument that the trial court committed reversible error when it denied Jason's request for an instruction on the lesser-included offense of ACSA.

¶ 22 “A defendant is entitled to a lesser included offense instruction only if an examination of the evidence reveals that it would permit a jury to rationally find the defendant guilty of the lesser

offense yet acquit the defendant of the greater offense.” *People v. Hamilton*, 179 Ill. 2d 319, 324 (1997) (citing *People v. Jones*, 175 Ill. 2d 126, 135 (1997) and *People v. Landwer*, 166 Ill. 2d 475, 486 (1995)). “A lesser included offense instruction is proper only where the charged greater offense requires the jury to find a disputed factual element that is not required for conviction of the lesser included offense.” *People v. Novak*, 163 Ill. 2d 93, 108 (1994), *abrogated on other grounds by People v. Kolton*, 219 Ill. 2d 353, 364 (2006). Even slight evidence may warrant an instruction on a lesser included offense. *In re Matthew M.*, 335 Ill. App. 3d 276, 284 (2002) (citing *Jones*, 175 Ill. 2d at 132). The evidentiary requirement “ ‘may be satisfied if the conclusion as to the lesser offense may fairly be inferred from the evidence presented.’ ” *People v. Garcia*, 188 Ill. 2d 265, 284 (1999) (quoting *Novak*, 163 Ill. 2d at 108). “Where some evidence supports the instruction, the circuit court's failure to give the instruction constitutes an abuse of discretion.” *People v. Castillo*, 188 Ill. 2d 536, 540 (1999) (citing *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998)).

¶ 23 Here, to prove that Jason committed ACSA, the State needed to show that Jason was over 17 years old and J.O. was under 13 years old when Jason touched J.O.’s vagina. 720 ILCS 5/12-16(c)(1)(i), 5/12-12(e) (West 2004). To prove PCSA, the State needed to prove the same facts, plus “sexual penetration” (720 ILCS 5/12-14.1(a)(1) (West 2004)), which the statute defines to include “any intrusion, however slight, of any part of the body of one person *** into the sex organ *** of another person” (720 ILCS 5/12-12(f) (West 2004)).

¶ 24 Augustina, Cordero and J.O. presented no evidence that any part of Jason’s body intruded into J.O.’s vagina. Paraday admitted that in the forensic interview, in response to a direct question about the extent of the contact, J.O. said that Jason’s hand stayed outside her vagina in both

incidents. The only evidence of penetration came from the written statement Jason signed which was inconsistent with his trial testimony. J.O.'s statements to Kato in the forensic interview constitute some evidence that Jason committed ACSA but not PCSA. A rational jury could rely on that evidence rather than Jason's confession. Therefore, the court had a duty to instruct the jury on the lesser-included offense of ACSA. See *Castillo*, 188 Ill. 2d at 540.

¶ 25 Because of our resolution of the instruction issue, we need not address the sentencing issue.

¶ 26 CONCLUSION

¶ 27 J.O.'s statements in her forensic interview support a finding that Jason committed ACSA but not PCSA. Therefore, the trial court had a duty to grant Jason's request for an instruction on the lesser-included offense of ACSA. Accordingly, because the trial court refused to give the instruction on the lesser-included offense, we reverse the convictions and remand for a new trial.

¶ 28 Reversed and remanded.